Supreme Court, U.S.
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No. 98-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ASSAF OIKNINE

PETITIONER

v.

UNITED STATES OF AMERICA

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE *ALLEN* CHARGE HAS CONTINUING VIABILITY IN LIGHT OF THE CONFLICTS BETWEEN THE VARIOUS CIRCUITS AND MODERN TREND TO DISALLOW SUCH INSTRUCTION.

2. WHETHER, IN THE ALTERNATIVE, THIS COURT SHOULD IMPOSE A RULE OF NATIONAL APPLICATION RELATIVE TO THE USE OF AN *ALLEN* CHARGE BASED UPON THE OVERRIDING NEED FOR NATIONAL UNIFORMITY ON THIS ISSUE, TO INCLUDE BARRING ITS USE AFTER THE JURY HAS BEGUN ITS DELIBERATIONS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1998

No. _____

ASSAF OIKNINE,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the

Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

ASSAF OIKNINE HEREBY PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

OPINIONS BELOW

THIS IS A DIRECT APPEAL FROM *UNITED STATES OF AMERICA V. ASSAF OIKNINE*, DISTRICT COURT No. 96-1010LGB, NINTH CIRCUIT COURT OF APPEALS No. 97-50447. THE UNPUBLISHED OPINION IS INCLUDED IN APPENDIX 1a - 6a. EN BANC HEARING REQUEST WAS DENIED ON DECEMBER 8, 1998, ALSO UNREPORTED, AND INCLUDED HEREIN AS APPENDIX 7a .

STATEMENT OF JURISDICTION

THIS IS A DIRECT APPEAL OF A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, EN BANC HEARING REQUEST DENIAL DATED DECEMBER 8, 1998. THE STATUTORY PROVISION THAT CONFERS JURISDICTION ON THE UNITED STATES SUPREME COURT IS 28 U.S.C. 1254.

STATEMENT OF THE CASE

PETITIONER WAS CHARGED IN 1996 IN A TWO COUNT INDICTMENT BY THE UNITED STATES ATTORNEY. COUNT ONE ALLEGED CONSPIRACY UNDER 18 U.S.C 371

AND COUNT TWO ALLEGED POSSESSION AND UTTERING A FORGED SECURITY, A VIOLATION OF 18 U.S.C 513, SUBD. (a). PETITIONER PLED NOT GUILTY AND TRIAL WAS BY JURY. PETITIONER WAS FOUND GUILTY OF BOTH COUNTS AND SENTENCED TO 38 MONTHS IN CUSTODY. HE IS CURRENTLY IN FEDERAL PRISON.

TRIAL ON THE MERITS, TO INCLUDE GOVERNMENT AND DEFENSE CASES IN CHIEF LASTED THREE DAYS. AFTER THREE AND HALF DAYS OF DELIBERATION, THE COURT RECEIVED A NOTE FROM THE JURY STATING THAT THEY WERE FIRMLY CONVINCED THAT THEY COULD NOT REACH A UNANIMOUS VERDICT ON EITHER COUNT. IN RESPONSE, THE COURT, OVER TRIAL DEFENSE COUNSEL'S OBJECTION, GAVE A MODIFIED *ALLEN* CHARGE. THE JURY RECEIVED THE INSTRUCTION 3:30 IN THE AFTERNOON, RECESSED AT THE END OF THE DAY, AT APROXIMATELY 5:00 P.M. AND RETURNED WITH GUILTY VERDICTS EARLY INTO THE NEXT MORNING OF THEIR DELIBERATIONS.

ARGUMENT

THIS COURT SHOULD ADOPT AS A NATIONAL STANDARD THE DECISIONS OF THE THIRD CIRCUIT AND

SEVENTH CIRCUIT COURTS OF APPEAL AND THE DISTRICT OF COLUMBIA COURT OF APPEALS DECISIONS OUTLAWING THE USE OF THE *ALLEN*[1] CHARGE AND THE GROWING NUMBER OF STATES THAT HAVE TAKEN THE SAME STEP.[2]

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1 *UNITED STATES V. FIORAVANTI*, 412 F.2D 407 (3RD CIR. 1969); *UNITED STATES V. BROWN*, 411 F.2D 930 (7TH CIR. 1969); *UNITED STATES V. THOMAS*, 449 F.2D 1177 (D.C. CIR. 1971)

2 *FIELDS V. STATE*, (ALASKA 1971) 487 P.2D 831; *STATE V. THOMAS*, (1959) 86 ARIZ. 161 [342 P.2D 197]; *TAYLOR V. PEOPLE*, (1971) 176 COLO. 316 [490 P.2D 292]; *BRYAN V. STATE*, (FLA.APP. 1973) 280 SO.2D 25; *STATE V. BROWN*, (1971) 94 IDAHO 352 [487 P.2D 946]; *PEOPLE V. MILLS*, (1971) 131 ILL.APP.2D 693 [268 N.E.2D 571]; *STATE V. NICHOLSON*, (LA. 1975) 315 SO.2D 639; *STATE V. WHITE, (ME. 1972) 285 A.2D 832; PEOPLE V. SULLIVAN*, (1974) 392 MICH. 324 [220 N.W.2D 441]; *STATE V. MARTIN*, (1973) 297 MINN. 359 [211 N.W.2D 765] *STATE V. RANDALL*, (1960) 137 MONT. 534 [353 P.2D 1054]; *STATE V. GARZA*, (1970) 185 NEB. 445 [176 N.W.2D 664]; *AZBILL V. STATE*, (1972) 88 NEV. 240 [495 P.2D 1064]; *STATE V. BLAKE*, (1973) 113 N.H. 115 [305 A.2D 300]; *STATE V. MINNS*, (1969) 80 N.M. 269 [454 P.2D 355]; *STATE V. CHAMPAGNE*, (N.D. 1972) 198 N.W.2D 218; *STATE V. MARSH*, (1971) 260 ORE. 416 [490 P.2D 491]; *COMMON WEALTH V. SPENCER* , (1971) 442 PA.328 [275 A.2D 299]; *STATE V. PATRIARCA*, (1973) 112 R.I. 14 [308 A.2D 300]; *KERSEY V. STATE*, (TENN. 1975) 525 S.W.2D 139; *KELLY V. STATE*, (1971) 51 WIS.2D 641 [187 N.W.2D 810]; *ELMER V. STATE*, (WYO.1969) 463 P.2D 14.

THE GROWING MODERN TREND TO PRECLUDE THE USE OF AN *ALLEN* CHARGE IS SOUNDLY PREMISED UPON THE NOTION THAT SUCH CHARGES HAVE THE POTENTIAL, AS IN THIS CASE, OF COERCING A JURY INTO A VERDICT. SUCH CHARGES ALSO CREATE PROFOUND DIFFICULTY IN CONFINING ITS USE WITHIN EQUITABLE GROUNDS AND CAUSES UNNECESSARY INEFFICIENCY WITHIN THE APPELLATE PROCESS WHEN TRYING TO DETERMINE WHETHER A TRIAL COURT HAS PROPERLY ADMINISTERED SUCH A CHARGE.

THE *ALLEN* CHARGE WAS INITIALLY DESIGNED TO ELICIT A VERDICT FROM A DEADLOCKED JURY AND WAS APPROVED IN *ALLEN V. UNITED STATES*, 164 U.S. 492 (1896). THE *ALLEN* CHARGE IS OFTEN REFERRED TO AS A VERDICT URGING CHARGE. *LOWENFIELD V. PHELPS*, 84 U.S. 231, 108 S.CT. 546 (1987). HOWEVER, THERE HAS BEEN A GRADUAL ELIMINATION OR MODIFICATION OF THE *ALLEN* CHARGE BY BOTH FEDERAL CIRCUIT AND STATE COURTS BECAUSE THE INSTRUCTION IS POTENTIALLY COERCIVE AND UNCONSTITUTIONAL., CAUSES JURORS TO CONSIDER INAPPROPRIATE FACTORS DURING DELIBERATION AND HAS PROMOTED JUDICIAL INEFFICIENCY.

AN *ALLEN* CHARGE SPEAKS ONLY TO THE MINORITY

OF JURORS AND INSTILLS IN THE MINDS OF THE JURORS THAT SOCIETAL COSTS OF RETRIAL SHOULD BE AVOIDED. THE *ALLEN* CHARGE LEADS THOSE JURORS IN THE MINORITY TO BELIEVE THAT THEY, RATHER THAN THE MAJORITY, MUST RECONSIDER THEIR VIEWS. *SEE UNITED STATES V. RODGERS*, 289 F.2D 433 (4TH CIR. 1961). SINCE IT IS THE MINORITY JURORS WHO ARE ASKED TO RECONSIDER THEIR OPINIONS, THE CHARGE SUGGESTS THAT THEY SHOULD DOUBT THE SOUNDNESS OF THEIR POSITIONS BECAUSE A MAJORITY OF THEIR PEERS HAVE COME TO AN OPPOSITE CONCLUSION. THE MAJORITY IS NEVER ASKED TO RECONSIDER THEIR POSITION AND THIS CHARGE REINFORCES THEIR BELIEFS AS TO THE CORRECTNESS OF THEIR POSITION. *SEE AN ARGUMENT FOR THE ABANDONMENT OF THE ALLEN CHARGE IN CALIFORNIA* (1975) 15 SANTA CLARA LAW REVIEW 939. AS A RESULT, AN *ALLEN* CHARGE CAUSES THE JURORS IN THE MINORITY TO ABANDON REASONABLE CONVICTIONS AND OPINIONS FOR THOSE ALREADY REACHED AND ACCEPTED BY THE MAJORITY. THIS IMPACT UPON THE DELIBERATION PROCESS VIOLATES THE RULE SET FORTH IN *BRASFIELD V. UNITED STATES*, 272 U.S. 448, 450 (1926), THAT EVERY CONSIDERATION OTHER THAN THAT OF THE EVIDENCE AND THE LAW

SHOULD BE KEPT OUT OF JURY DELIBERATION. IF THE *ALLEN* CHARGE HAS THE EFFECT OF UNDERMINING THE DELIBERATION PROCESS, THAT RISK ALONE SHOULD WEIGH AGAINST THE CONTINUED VIABILITY OF THIS CHARGE.

IN ADDITION TO THE FEDERAL CIRCUITS AND STATES IDENTIFIED PREVIOUSLY, NUMEROUS COMMENTARIES HAVE CRITICIZED THE *ALLEN* CHARGE. *SEE AN ARGUMENT FOR THE ABANDONMENT OF THE ALLEN CHARGE IN CALIFORNIA*, (1975) 15 SANTA CLARA LAW REVIEW 939; *THE ALLEN CHARGE: RECURRING PROBLEMS AND RECENT DEVELOPMENTS*, (1972) 47 N.Y.U.L. REV. 296; *NOTE, DUE PROCESS, JUDICIAL ECONOMY AND THE HUNG JURY: A REEXAMINATION OF THE ALLEN CHARGE*, (1967) 53 VA.L.REV. 123; *DEADLOCKED JURIES AND DYNAMITE: A CRITICAL LOOK AT THE ALLEN CHARGE*, (1964) 31 U.CHI.L.REV. 386. THIS CHARGE HAS BEEN SUBJECTED TO A BARRAGE OF CRITICISM AND ATTACKS SINCE ITS CONCEPTION. MOREOVER, MANY CIRCUITS HAVE ATTEMPTED TO TEMPER THIS CHARGE BY DRAFTING MODEL INSTRUCTIONS, PURPORTEDLY TO LESSEN THE HARSH IMPACT OF THE CHARGE.

IN *LOWENFIELD V. PHELPS*, 484 U.S.231, 108 S.CT. 546, 559 (1987), IN HIS DISSENTING OPINION, JUSTICE

MARSHALL STATED THAT, "OTHER FEDERAL COURTS HAVE RECOGNIZED THAT AN ALLEN CHARGE GIVEN ON THE HEELS OF A JURY POLL POSES SPECIAL RISKS OF COERCION." CITING *UNITED STATES V. SAE-CHUA*, 725 F.2D 530, 523 (9TH CIR. 1984); *CORNELL V. IOWA*, 628 F.2D 1044, 1048 N.2 (8TH CIR. 1980), *CERT.DEN.*, 449 U.S.1126, 101 S.CT. 944 (1981); *WILLIAMS V. UNITED STATES*, 119 U.S.APP.D.C. 190, 193, 338 F.2D 530, 533 (1964). JUSTICE MARSHALL ALSO STATED IN *LOWENFIELD, ID*, THAT, "THESE COURTS HAVE NOTED THAT WHEN A JURY POLL IS FOLLOWED BY AN ALLEN CHARGE, 'THE IMPRESSION IS INHERENTLY CONVEYED TO THE JURY THAT THE REVELATION OF THEIR DIVISION PROMPTED THE GIVING OF THE SUBSEQUENT VERDICT-URGING INSTRUCTION AND THAT IT IS, THEREFORE, DIRECTED TOWARD THE MINORITY JURORS'". *CORNELL, ID*, AT 1048, N.2.

OTHER FEDERAL CIRCUITS ARE QUESTIONING THE VALIDITY OF THE CONTINUED USE OF THE *ALLEN* CHARGE WHILE NOT YET OUTLAWING OUTRIGHT. THE ELEVENTH CIRCUIT HAS NOTED THAT, "THE MODERN TREND IS ..... AGAINST THE ALLEN CHARGE." *UNITED STATES V. REY*, 811 F.2D 1453, 1458-1460 (11TH CIR. 1987). *SEE ALSO UNITED STATES V. BAILEY*, 468 F.2D 652, 668 (5TH CIR. 1972). THE TENTH CIRCUIT IN *UNITED STATES V.*

BLANDIN, 784 F.2D 1048, 1050 (10TH CIR. 1986) HELD THAT, "WE HAVE APPROVED THE ALLEN INSTRUCTION AS PERMISSIBLE IN THE TENTH CIRCUIT BUT URGE CAUTION IN ITS USE ..... IT SHOULD NOT BE GIVEN DURING THE COURSE OF DELIBERATIONS."

THE FIRST CIRCUIT HAS SAID THAT THE USE OF THE DYNAMITE CHARGE SHOULD BE USED WITH GREAT CAUTION AND ONLY WHEN ABSOLUTELY NECESSARY. *UNITED STATES V. FLANNERY*, 451 F.2D 880, 883 (1ST CIR. 1971). THE SECOND CIRCUIT HAS "GRAVE DOUBTS" ABOUT *ALLEN* AND THAT IT HAS PERMITTED *ALLEN* TO STAND THE TEST OF TIME ONLY BY THE "BAREST MARGIN". *SEE UNITED STATES V. KENNER*, 354 F.2D 780, 782-84 (2ND CIR. 1965). THE EIGHTH CIRCUIT ONLY ALLOWS THE LITERAL RECITATION OF THE LANGUAGE OF THE CHARGE FROM THE SUPREME COURT'S PARAPHRASE OF THE TRIAL COURT'S CHARGE IN *ALLEN* AND HAS PROHIBITED THE READING OF THE SECOND PARAGRAPH TO THE JURY FROM THE *ALLEN* DECISION. *UNITED STATES V. BAILEY, ID* AT 667, CITING *CHICAGO & E.I. RY. V. SELLARS*, 5 F.2D 31 (8TH CIR. 1925).

CONCLUSION

THE *ALLEN* CHARGE CONTINUES TO CREATE AN APPELLATE WORKLOAD FAR IN EXCESS OF ANY JUDICIAL ECONOMY THAT IT ATTEMPTS TO CREATE. MOST OF THE CIRCUITS HAVE REVISITED THIS ISSUE TIME AND TIME AGAIN, TRYING TO FASHION SOME WORKING INSTRUCTION THAT WILL AMELIORATE THE IMPACT OF THE DYNAMITE CHARGE. CLEARLY, THE SOUNDEST WAY TO INSURE AGAINST POTENTIAL JUROR COERCION IS TO OVERTURN THE *ALLEN* DECISION AND TO OUTLAW SUCH INSTRUCTION, OR IN THE ALTERNATIVE, ESTABLISH AN INSTRUCTION THAT IS NATIONAL IN SCOPE, LIMITING IT TO INCLUSION IN JUROR INSTRUCTIONS *PRIOR* TO THE COMMENCEMENT OF DELIBERATION.

FOR THE FOREGOING REASONS, PETITIONER, ASSAF OIKNINE, RESPECTFULLY REQUESTS THAT THIS COURT GRANT HIS PETITION FOR WRIT OF CERTIORARI.

RESPECTFULLY SUBMITTED THIS 6TH DAY OF MARCH, 1999.

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APPENDICES

APPENDIX A

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-50447
CT/AG#: CR-96-1010 LGB

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ASSAF OIKNINE

Defendant - Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District

Court in this case be, and hereby is, AFFIRMED.

Filed and entered October 20, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	No. 97-50447
Plaintiff - Appellee	D.C. CR-96-1010LGB
v.	**MEMORANDUM***
ASSAF OIKNINE	
Defendant - Appellant	

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted October 8, 1998
Pasadena, California

Before: BRUNETTI, FERNANDEZ AND McKEON, Circuit Judges

Assaf Oiknine appeals his jury conviction of conspiracy to possess and utter a forged security, in violation of 18 U.S.C. s 371,

and possessing and uttering a forged security, in violation of 18 U.S.C. s 513 (a). We affirm.

1. Oiknine first challenges the district court's *Allen* charge.[1] He argues that the court's instruction to continue deliberating, given early in the process, was a"de facto" *Allen* charge that rendered its later *Allen* instruction impermissibly coercive. *See United States v. Seawell*, 550 F.2d 1159, 1162-63 (9th Cir. 1997) ("*Seawell I*") We disagree. The earlier instruction was not a "de facto" *Allen* charge at all. *See United States v. Wills*, 88 F.3d. 704, 716 (9th. Cir.) *cert.denied*_____U.S. _____, 117 S.Ct. 499, 136 L.Ed. 2d 390 (1996); *accord United States v. Cuozzo*, 962 F.2d 945, 951 (9th Cir. 1992); *United States v. Foster*, 711 F.2d 871, 884 n.8 (9th Cir. 1983); *cf Jimenez v. Myers*, 40 F.3d 976, 980-81 (9th Cir. 1994) (per curium). Rather, it "legitimately served to clarify the district court's purpose in returning the jury to deliberate despite their seeming inability to make progress." *Cuozzo*, 962 F.2d at 951. Therefore the court's later, modified *Allen* instruction was not rendered coercive because of its earlier instruction. *See United States v. Ajiboye*, 961 F.2d 892, 893-94 (9th Cir. 1992).

Nor was the later *Allen* instruction itself impermissibly coercive.

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[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

[2] *See Foster*, 711 F.2d 884. Its form was proper. *Cuozzo*, 962 F.2d at 952; *United States v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985) (per curium); *United States v. Seawell*, 583 F.2d 416, 417-18 & n.2 (9th Cir. 1978) ("*Seawell II*"); *Seawell I*, 550 F.2d at 1161-62 & n.2 . The time between giving of the *Allen* instruction and the jury's return of verdict does not indicate coercion. *See United States v. Easter*, 66 F.3d 1018, 1023 (9th 1995), *cert.denied*, 516 U.S. 1150, 116 S.Ct. 1026, 134 L. Ed. 2d 104 (1996); *United States v. Lorenzo*, 43 F.3d 1303, 1307 & n.3 (9th Cir. 1995); *Cuozzo*, 962 F.2d at 952 & n.6; *Bonam*, 772 F.2d at 1451; *United States v. Beattie*, 613 F.2d 762, 765-66 (9th Cir. 1980). Nor was the total time of deliberation disproportionate to the jury's task. *See United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir.) *cert. denied*, ____U.S. _____, 118 S.Ct. 227, 139 L.Ed 2d 160 (1997); *Cuozzo*, 962 F.2d at 952 & n.6; *Foster*, 711 F.2d 884; *Beattie*, 613 F.2d at 766. There were no other indicia of coerciveness. *See Hernandez*, 105 F.3d at 1333-34; *Easter*, 66 F.3d at 1023; *Ajiboye* 961 F.2d at 894. Moreover, the court cautioned the jurors not to blindly succumb to the pressure of opposing views. *See Lorenzo*, 43 F.3d at 1307; *Ajiboye*, 961 F.2d

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2 We reject the notion that an *Allen* charge is always impermissibly coercive. *See Wills*, 88 F.3d at 716 n.6; *United States v. Mason* 658 F.2d 1263, 1266 n.4 (9th Cir. 1981).

at 894. Thus we cannot say that it is "clear from the record" that the *Allen* charge coerced the jury. *See Lorenzo*, 43 F.3d 1307.

2. Oiknine's second claim is that the trial court's limitation on cross-examination of government witness Taves requires reversal. Again, we disagree. The district court did not abuse its discretion when it limited cross-examination regarding Taves' prior convictions, arrests and civil suits. The district court admitted evidence of one misdemenaor fraud conviction as well as a guilty plea to forged check charges. Oiknine offers no persuasive reason why, based upon his proffers, the court was required to allow further, cumulative evidence of Taves' unsavory past. *See United States v. Jackson*, 882 F.2d 1444, 1447 (9th Cir. 1989). Moreover, the jury already had sufficient information with which to evaluate Taves' credibility. *See United States v. Manning* 56 F.3d 1188, 1197 (9th Cir. 1995); *Jackson*, 882 F.2d at 1446-47.

Nor did the court violate Oiknine's Sixth Amendment right to confrontation. Once cross-examination has provided "sufficient information with which to appraise a witness' s possible bias and motives, confrontation demands are satisfied." *United States v. Bonanno*, 852 F.2d 434, 439 (9th Cir. 1988) The jury had a plethora of impeaching information before it. More was not required.

AFFIRMED

APPENDIX B

[Filed December 8, 1998]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	No. 97-50447
	)	
Plaintiff - Appellee,	)	CR-96-01010-LGB
	)	
v.	)	ORDER DENYING
	)	PETITION FOR
ASSAF OIKNINE	)	REHEARING
	)	AND REJECTING
Defendant - Appellant	)	SUGGESTION FOR
	)	REHEARING EN BANC
	)	

Before: BRUNETTI, FERNANDEZ AND McKEON, Circuit Judges

The panel has unnanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.